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IN THE UNITED STATES SUPREME COURT

LEWIS DISIBIO and MARY DISIBIO
Petitioners

vs.

MISSION NATIONAL BANK
Respondent

On Petition for Writ of Certiorari
to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The underlying issue in this case is whether a bank that takes over the accounts of a failed savings and loan, through the mediation of a federal receiver acting under FIERRA, accrues both initial freedom to alter the interest rates on all assumed-accounts, and continuing freedom to unilaterally rewrite the terms of those accounts in perpetuity. The immediate question for this Court is whether the Ninth Circuit panel, in its summary treatment of petitioners' appeal, so seriously departed from the proper course of judicial proceedings as to call for this Court's exercise of supervisory power, at least to the extent of GVR.

In this case, the Ninth Circuit denied oral argument and issued a one-and-a-half page memorandum disposition which failed to engage petitioners' arguments and authorities, and embodied obvious errors as to some of the basic facts of the case. The most plausible explanation for this decision-making would seem to be that the panel jumped to the conclusion that, in light of an amicus brief filed by the FDIC, petitioners' appeal could be summarily rejected, without more than cursory attention to petitioners' briefs and without oral argument. The panel appears to have given *Chevron* deference to an alleged FDIC policy, which, though purportedly well-established, has never been made public, and was never mentioned in the district court proceedings or decision herein, being raised for the first time in respondent's opposition brief and the amicus brief on appeal. On petition for rehearing and for oral argument, the Ninth Circuit panel did no more than delete one sentence from its memorandum disposition and substitute a different sentence, so as to (partially) correct one of its errors as to the basic facts of the case. Among petitioners' arguments that the panel failed to address, or even acknowledge, in any way, is the seemingly indisputable assertion that even if respondent successor bank had the initial right to make certain changes in the terms of petitioners' assumed-account contract, respondent did not have the right to make continuing unilateral changes in account terms over the subsequent life of the account.

The questions presented are:

1. Whether the most plausible explanation for the Ninth Circuit's decision-making in this matter is a grant of *Chevron* deference to the FDIC policy alleged in the FDIC's amicus brief on appeal, resulting in a preemption of California contract law by informal FDIC policy-making, contrary to the guidance of the case law of this Court and other circuits.

2. Whether a bank can continue to derogate the contractual rights of account-holders on the ground that the bank's 1990 agreement with a federal receiver, by which the bank took over the accounts in question from a failed institution, empowered the bank with permanent discretion to unilaterally rewrite the terms of the account contracts.

3. Whether parties appealing from a district court's grant of summary judgment have a due process right to something more than a cursory examination of and response to their arguments on appeal; whether there is a threshold beyond which an appellate court's inattention to or misconstruction of the record, cursory disposal of arguments, ignoring of relevant authorities, and denial of oral argument adds up to deprivation of due process of law.

4. Whether the Ninth Circuit, in its cursory treatment of petitioners' appeal, and its apparent deference to the FDIC, so seriously departed from the proper course of judicial proceedings as to call for this Court's exercise of supervisory power, at least to the extent of GVR.

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OPINIONS BELOW

There are no published opinions. The two district court opinions, the Ninth Circuit's memorandum disposition on appeal, and its order denying rehearing and oral argument are all reproduced in the Appendix ("Apdx.") attached hereto.

JURISDICTION

The Ninth Circuit's memorandum disposition was filed on April 11, 2005. A timely petition for rehearing and oral argument was denied on September 7, 2005 (except that the Ninth Circuit panel amended its memorandum disposition by deleting one sentence and substituting a different sentence). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent statutes are 12 U.S.C. § 1821(e) and 28 U.S.C. § 2106. Apdx. *infra*, 27a - 29a.

STATEMENT OF THE CASE

I. Introduction

The underlying issue in this case is whether a bank that takes over the accounts of a failed savings and loan, through the mediation of a federal receiver acting under FIRREA, accrues both initial freedom to alter the interest rates on all assumed-accounts, and continuing freedom to unilaterally rewrite the terms of those accounts in perpetuity. The immediate question for this Court is whether the Ninth Circuit panel, in its cursory treatment of petitioners' appeal, made such errors of law, and/or so seriously departed from the proper course of judicial proceedings, as to call for this Court's exercise of supervisory power, at least to the extent of GVR.

In this case, the Ninth Circuit denied oral argument and issued a one-and-a-half page memorandum disposition declining to seriously engage petitioners' arguments, and embodying obvious errors as to some of the basic facts of the

case (Apdx. pp. 2a - 3a). The most plausible explanation would seem to be that the panel jumped to the conclusion that, in light of an amicus brief filed by the FDIC, petitioners' appeal could be summarily rejected, without more than cursory attention to petitioners' briefs and without oral argument. The panel appears to have given *Chevron* deference to an alleged FDIC policy, which, though purportedly well-established, has never been made public, and was never mentioned in the district court proceedings or decision, being raised for the first time in respondent's opposition brief and the FDIC amicus brief on appeal. On petition for rehearing and for oral argument, the Ninth Circuit panel did no more than delete one sentence from its memorandum and substitute a new sentence, so as to (partially) correct one of its errors as to the basic facts. Id. p. 1a.

The fact that the case law which the party requesting GVR relies on was actually briefed in the court below does not stand in the way of GVR in cases "where the lower court's order shows no sign of having applied the precedents that were briefed." *Lawrence on Behalf of Lawrence v. Chater*, 516 U.S. 163, 116 S.Ct. 604, 608. This is demonstrably such a case.

Because the essence of this petition has to do with the apparent failure of the court of appeal to give petitioners' briefs a serious reading and petitioners' arguments a fair hearing, a substantial exposition of the history of argument below is required. The facts stated, *infra*, were proffered and argued below, and are offered here to show what was before, and passed over by, the court of appeal.

II. Proceedings in the District Court

Petitioners Lewis and Mary diSibio filed the complaint in this action in September 2001, in the U.S. District Court for the Northern District of California, alleging violation of the Truth In Savings Act ("TISA"), 12 USC §4301, and state law contract and statutory violations, all against Mission National Bank and Mission National Bank only. The diSibios were owners of an interest-bearing negotiable order of withdrawal ("NOW")

account at Mission National Bank ("MNB") with regard to which they alleged MNB had committed said violations on an on-going basis throughout the 1990s (ORDER, Apdx. p. 5a). Jurisdiction of the district court was based on 12 USC § 1331.

The diSibio NOW account had originally been with City Federal Savings and Loan Association ("City Federal"). In April 1989, City Federal became insolvent, but continued operating under a conservator (Apdx. 6a). In May of 1990, City Federal was taken into receivership by the Resolution Trust Corporation ("RTC"), and was then merged into MNB through the instrumentality of a Deposit Insurance Transfer and Asset Purchase Agreement ("DITAPA") between MNB and the RTC, pursuant to FIRREA (the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, 12 USC §1821). The diSibios received no notice of the insolvency, receivership, conservatorship, or DITAPA. Apdx. 6a, 11a, n9.

The diSibios' complaint contended that on taking over their account from City Federal, MNB became obligated to meet the contractual terms of that account as they existed between the diSibios and City Federal under California law. As regards such deposit contracts, MNB was City Federal's successor in interest, pure and simple. The diSibios further contended that MNB knowingly violated those obligations in a variety of ways and on a continuing basis, and committed multiple TISA violations, throughout the 1990s. Apdx. 16a - 22a.

For the first year of litigation, MNB did not contest the diSibios' allegation of contractual continuity between MNB and City Federal (Apdx. 16a - 19a); indeed, in the Joint Case Management Conference Statement and Proposed Order of February 12, 2002, MNB stipulated that "Bank is the successor in interest to City Federal Savings and Loan Association ... Plaintiffs' original deposit agreement and attendant rights and obligations were transferred to Defendant by the Resolution Trust Corporation ... on or about May 18, 1990." During this period, it appeared that the only defense to liability MNB contemplated was one relying on various statutes of limitation,